BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF CHESAPEAKE UTILITIES CORPORATION REGARDING ITS ACQUISITION AND CONVERSION OF PROPANE COMMUNITY GAS SYSTEMS (FILED JUNE 29, 2018)	))))))	**PSC DOCKET NO. 18-0933**

OPPOSITION OF CHESAPEAKE UTILITIES CORPORATION TO THE PETITION TO INTERVENE FILED BY THE DELAWARE ASSOCIATION OF ALTERNATIVE ENERGY PROVIDERS, INC., THE MID-ATLANTIC PROPANE GAS ASSOCIATION, AND THE MID-ATLANTIC PETROLEUM DISTRIBUTORS ASSOCIATION

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DATED: October 30, 2018

Chesapeake Utilities Corporation ("Chesapeake") hereby opposes the Petition for Leave to Intervene (the "Petition") filed in the above-captioned proceeding by the Delaware Association of Alternative Energy Providers, Inc. ("DAAEP"), the Mid-Atlantic Propane Gas Association ("MAPGA") and the Mid-Atlantic Petroleum Distributors Association ("MAPDA") (collectively, the "Petitioners").

INTRODUCTION AND SUMMARY OF ARGUMENT

1. First and foremost, the Commission should deny the Petition on its face because it was filed almost 2 months after the expiration of the Commission-ordered deadline for filing petitions to intervene in this case and the Petitioners failed to assert *any "good cause" explanation* to justify their intervention out-of-time, as required by Commission rules. Furthermore, the Petition directly contradicts a 2017 order of the Delaware Superior Court[1] holding that the Commission lacked the statutory authority to grant intervention in Commission proceedings to DAAEP, an unregulated competitor of a regulated public utility (Chesapeake). The Petitioners argue that the Commission should simply ignore the Superior Court Order; however, as explained more fully herein, all of their attacks on that order fail. Finally, the Petition fails to satisfy either prong of the Commission's intervention rule because: (1) any legitimate issues raised by the Petitioners are more than adequately represented by other parties in this proceeding; and (2) the Petitioners have not articulated any reason sufficient to explain why their participation in this proceeding would further the public interest.[2] For all of the aforementioned reasons, the Commission should deny the Petition.

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[1] *Chesapeake Utilities Corp. v. Delaware Public Service Commission*, C.A. No. K17A-01-001 WLW, (Del. Super., June 7, 2017), Witham R.J. ("Superior Court Order"). *See* Superior Court Order attached to Petition at Exhibit C.

[2] The Rules of Practice and Procedure of the Commission provide that the Commission *shall not* grant leave to intervene if: (1) the parties to the proceeding adequately represent the interest of the person seeking to intervene; *or* (2) the person's intervention in the proceeding would *not* be in the public interest. *See* 26-1001-2.0 *Del. Admin. C.* § 2.9.1.3.

ARGUMENT

A. The Petitioners Failed to Seek Intervention Timely and Did Not Proffer Any Good Cause Justification for Their Failure.

2. Chesapeake filed its application in this proceeding on June 28, 2018 (four months ago). On July 24, 2018, the Commission issued its opening order (Order No. 9254) that, among other things, set the intervention deadline in this matter:

> That the deadline for filing petitions to intervene pursuant to Rule 2.9 of the Commission's Rules of Practice and Procedure shall be **Friday, August 17, 2018.** Late-filed petitions to intervene will not be granted unless good cause is shown.[3]

See Order No. 9254 at 4 (¶ 5). In addition, the Commission ordered Chesapeake to publish newspaper notice describing its application and the intervention deadline during the week of July 30, 2018. *Id.* at 3 (¶ 3). Chesapeake's application in this case has been publicly available through the Commission's website (i.e., DelaFile) for 4 months and Chesapeake published the public notice of the application and the intervention deadline 3 months ago.

3. The Petitioners filed the Petition on October 11, 2018 – almost *2 months* after the expiration of the intervention deadline. However, the eleven-page Petition fails even to mention the fact that it is untimely nor does it include *any argument* demonstrating good cause to justify the Petitioner's late intervention. The Commission's opening order (Order No. 9254) explicitly provides that "[l]ate filed petitions to intervene *will not be granted* unless good cause is shown." *Id.* at 4 (¶ 5) (emphasis supplied). The Petition fails to proffer *any* reasons (let alone "good cause") to explain and justify the Petitioner's failure to meet the August 17, 2018 intervention deadline. For this reason alone, the Commission should reject the Petition.

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[3] The Commission's regulations provide that "[l]ate intervention may be sought and granted for good cause shown." 26-1001-2.0 *Del. Admin. C.* § 2.9.2.

B. The Superior Court Order Requires the Commission to Deny the Petition.

4. Just a year and a half ago, the Delaware Superior Court *explicitly reversed* a Commission order granting DAAEP intervention into Chesapeake's most-recent rate case and held that, "[t]he Commission *exceeded its statutory authority* when it granted DAAEP's petition to intervene because the Commission *may not consider the competitive interests of unregulated competitors*." Superior Court Order at 7 (emphasis supplied). Not only did the Court specifically reverse the Commission's prior intervention order, the Court carefully explained the public policy in support of its decision and its intent to provide guidance to the Commission to be applied to future intervention petitions:

> This outcome makes sense as a matter of policy. If permitted to intervene, unregulated competitors may participate in discovery to the same extent as other intervenors, increasing burdens on the State (through the Commission and the Division of Public Advocate), the regulated utility and its ratepayers, and other proper intervenors. A more carefully circumscribed intervention standard thus not only accords with the Commission's grant of authority, but also effectuates the public interest by keeping the costs of rate proceedings in check.

Superior Court Order at 9.

5. Notwithstanding certain transparent and empty assertions to the contrary, the Petitioners concede that they seek to intervene in the present case for the purpose of protecting their competitive interests:

> There is a substantial likelihood that the **petitioners' businesses and finances will be significantly affected by Chesapeake's proposal** to have the Commission regulate the sale and distribution of propane in Delaware. ... There is also a likelihood that the members and employees of the **petitioners will be directly affected by Chesapeake's proposal to significantly expand the reach of its natural gas service to eliminate or stifle energy competition in the future** in large areas of Delaware.

Petition at 5 (¶ 10) (emphasis supplied).

6. Of course, DAAEP similarly sought to protect its competitive interest through the prior Commission intervention order reversed by the Superior Court Order. Accordingly, the doctrine of *res judicata* applies and the Superior Court Order bars the Commission from granting the Petition. *See Betts v. Townsends, Inc.*, 764 A.2d 531, 534 (Del. 2000) ("Essentially, *res judicata* bars a court or administrative agency from reconsidering conclusions of law previously adjudicated while collateral estoppel bars relitigation of issues of fact previously adjudicated."). The Supreme Court of Delaware explained *res judicata* as follows:

> *Res judicata* operates to bar a claim where the following five-part test is satisfied: (1) the original court had jurisdiction over the subject matter and parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the appellants in the case at bar; and (5) the decree in the prior actions was a final decree.

Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n, 902 A.2d 1084, 1092 (Del. 2006). Chesapeake submits that Superior Court Order satisfies all 5 criteria to establish its *res judicata* effect as to DAAEP. In addition, the Superior Court Order bars the Petition as it relates to MAPGA and MAPDA because their interests in the present case are identical to DAAEP's interest in the prior appeal – therefore they are in "privity" for purposes of *res judicata*.[4] *See Aveta, Inc. v. Cavallieri*, 23 A.3d 157, 180 (Del. Ch. 2010) ("Parties are in privity for *res judicata* when their interests are identical or closely aligned such that they were actively and adequately represented in the first suit."); *Higgans v. Walls*, 901 A.2d 122, 138 (Del Super. Ct.

[4] Delaware law excludes propane and fuel oil companies from economic regulation by the Commission. *See* 26 *Del. C.* § 102(2) (defines "public utility" to include "natural gas, electric ... water, wastewater" and certain "telecommunications" service – but not propane or fuel oil). As explained in the Petition, "[t]he petitioners are associations with members who market, sell and distribute propane, heating oil and gasoline in Delaware." Petition at 5 (¶ 10). Similar to DAAEP, both MAPGA and MAPDA (and their respective members) are not regulated by the Commission and they seek to intervene here to protect their competitive interests. *Id.* Accordingly, the Superior Court Order applies with equal force to MAPGA and MAPDA.

2005) ("Courts have held that a nonparty will be bound when its interests were represented adequately by a party in the original suit.").

7. To be clear, the Superior Court Order controls and the Commission lacks the statutory authority to grant the Petition and therefore, the Commission must reject it. However, the Petitioners argue that the Commission should ignore the Superior Court Order for three reasons: "the order does not constitute valid precedent, is distinguishable, and incorrectly decided as a matter of law and fact." Petition at 7 (¶ 14). All three of these arguments are without merit.

8. The Petitioners argue that the settlement in Chesapeake's last rate case "made the issue of intervention moot, and the Superior Court order was, in essence, an advisory opinion, which cannot be considered precedential" and the "fact that the parties, including DAAEP, agreed to preserve the intervention issue for appeal and briefed the issue could not confer jurisdiction on the Superior Court, as parties cannot confer jurisdiction upon a court by agreement, where it does not otherwise exist." Petition at 9 (¶ 16) (citations omitted). The prior intervention issue, however was not moot because the parties' settlement agreement explicitly and appropriately preserved the issue for appeal.

9. It is settled that parties may preserve an issue for appeal within a settlement agreement.[5] In *Keefe v. Prudential Prop. & Cas. Ins. Co.*, 203 F.3d 218, 222-23 (3d Cir. 2000), the United States Third Circuit Court of Appeals first "acknowledged the general rule that a party cannot appeal a consent judgment" but noted that "[w]e have never considered, however, the appealability of a consent judgment where the party seeking to appeal has made explicit in a

[5] *See* 15A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 3902 at 95 and n. 63 (2d ed. 1992) ("And, perhaps more important, an express agreement reserving the right to appeal will be honored."); 4 C.J.S. *Appeal and Error* § 60 ("A settlement agreement between the parties will generally moot an appeal, *unless a party has preserved the right to appeal in the agreement*, or the agreement has not encompassed all of the issues.") (emphasis supplied).

stipulation its intent to appeal the consent judgement."[6] The Third Circuit court then adopted other circuits' view that consent judgments are appealable when the right to appeal is explicitly reserved and held:

> When it is clear from the agreement between the parties that the losing party intends to appeal, however, it is unlikely that an appeal will undermine the settlement agreement or catch a party unawares. Indeed, in some situations the option to craft a settlement agreement that provides for the possibility for an appeal on some contested issue may facilitate settlement of other issues. Recognizing these principles, some of our sister circuits have held that a party to a consent decree or other judgment entered by consent may appeal from that decree or judgment if it explicitly reserves the right to do so.[7]

Id. at 223 (citations omitted). Here, it is undisputed that the Superior Court Order was the result of a settlement agreement executed by all parties (including DAAEP) that *explicitly preserved* Chesapeake's right to appeal the Commission's intervention order. Importantly, Judge Witham noted that the settlement agreement explicitly preserved the intervention order for appeal.[8] Pursuant to Delaware Superior Court Civil Rule 72(i), Judge Witham could have dismissed the prior appeal *sua sponte* if he believed the Superior Court lacked jurisdiction to hear it – but obviously he did not. Contrary to Petitioners' argument, the prior settlement agreement did not "confer" jurisdiction on the Superior Court, rather the agreement preserved the parties'

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[6] Similarly, Delaware state courts have adopted the "general rule" that a party may not appeal a consent judgement. *See Maddox v. Justice of the Peace Court No. 19, et al.*, 1991 WL 215650 at *4 (Del. Super. Ct. 1991). However, *Maddox* did not involve a consent judgment that explicitly preserved a party's right to appeal a particular issue. In *Maddox* the court denied the appellant's attack on the consent judgment itself because "the facts do not support the existence of any exception to the general rule ...". *Id.* Indeed, the Court of Chancery recently recognized (albeit in dicta) that parties may enter into a consent judgment that preserves their rights to appeal. *See Service Corp. of Westover Hills v. Guzzetta*, 2011 WL 3307921 (Del. Ch. 2011) ("Here, the Court would hope that the parties might reach agreement on the amount of the Guzzettas' damages, subject to their respective abilities to preserve any rights to appeal from the rulings reflected in this Memorandum Opinion. If so, they may submit an appropriate proposed judgment consented to as to form.").

[7] *See also, Independent School Dist. 833 v. Bor-Son Const., Inc.*, 631 N.W.2d 437, 440 (Minn. Ct. App. 2001) ("It is illogical to say that the same settlement that explicitly reserved [appellant's] right to appeal also prohibits [appellant] from exercising that right."); *Uncle Joe's Inc. v. L.M. Berry & Co.*, 156 P.3d 1113, 1120-21 (Alaska 2007) ("In a civil case, at most, a party may appeal from a stipulated judgment where the stipulation expressly reserves an issue for appeal.").

[8] *See* Superior Court Order at 4 ("The settlement resolved all the issues in the case other than DAAEP's standing to intervene, which it preserved for appeal.").

conflicting positions on the prior intervention order and appropriately reserved the right to appeal that issue.[9]

10. The Petitioners cite to *El Paso Gas Co. v. Transamerican Gas Corp.*, 669 A.2d 36, 39 (Del. 1995) for the principle that "jurisdiction of a court over the subject matter cannot be conferred by consent or agreement." Petition at 9 (¶ 16). While this general principle may be true, that is not what happened here. Therefore, *El Paso* is inapposite. More importantly, *El Paso* has been overruled by the Delaware Supreme Court. *See Nat'l Indus. Gp. (Hldg.) v Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373 (Del. 2013). In *El Paso*, the Supreme Court found that a forum selection clause purporting to vest jurisdiction in the Chancery Court was itself invalid because it ignored the limited jurisdiction of that court.[10] *See El Paso*, 669 A.2d at 38-39. However, in *Carlyle*, the Supreme Court *enforced* a properly drafted forum selection clause and explained:

> This Court's decision in *El Paso* was based upon the facial invalidity of the forum selection clause. El Paso's argument "rest[ed] upon the faulty premise that jurisdiction in the Delaware Court of Chancery is a right that could be created by contract." Because El Paso had no power to confer exclusive jurisdiction over all disputes, including purely legal ones, on the Court of Chancery, there was no right that could be enforced by an anti-suit injunction. ... The forum selection clause in this case differs from the one in *El Paso*, because it confers jurisdiction on "the courts of the State of Delaware," not solely on the Court of Chancery.

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[9] The Petitioners cite *Rollins International, Inc. v. International Hydronics Corp.*, 303 A.2d 660, 662 (Del. 1973), for the general principle that courts do not entertain suits that seek advisory opinions or an adjudication of hypothetical questions. *See* Petition at 9 (¶ 16). Chesapeake does not dispute this point. However, *Rollins* did not involve a settlement agreement explicitly preserving an issue for appeal. Moreover, in *Rollins* the Supreme Court ruled that the Declaratory Judgment concerning the agreements at issue presented an "actual controversy" and allowed the action to move forward. *See Rollins*, 303 A.2d at 663. As explained above, the settlement agreement here likewise presents an "actual controversy" because it specifically preserved the parties' conflicting positions regarding the prior intervention order.

[10] Delaware law specifically limits the jurisdiction of the Chancery Court to hear only matters and causes in equity. In other words, the Chancery Court is the court constitutionally and statutorily empowered to grant injunctions and the remedy of specific performance. *See* Del. Const. art. 4, § 10; 10 *Del. C.* §§ 341-42. However, under the forum selection clause at issue in *El Paso*, the parties agreed that *all* disputes (*i.e.*, in law *or* equity) between them would be resolved by the Chancery Court.

Carlyle, 67 A.2d at 382 (citations omitted). The Supreme Court further explained that "[f]orum selection clauses afford the parties an opportunity to agree to have any disputes between them resolved in a neutral forum of their mutual choice that has experience in the subject matter" and held "[t]o the extent that our decision in *El Paso* is inconsistent with our holding in this case or *Ingres*, *El Paso* is overruled." *Id.* at 385 (emphasis supplied). Here, the Superior Court was the appropriate forum for judicial review of the Commission order and no party has argued otherwise. *See* 26 *Del. C.* 510(a). If anything, *El Paso* and *Carlyle*, actually *support* Chesapeake's argument because they demonstrate that the Delaware Supreme Court has recognized that it will enforce a properly drafted agreement through which the parties choose a court to resolve their dispute.

11. Next, the Petitioners claim that the Superior Court Order is factually distinguishable from the present case because this case involves a different request (from the prior rate case) and the "petitioners interest in this docket is necessarily far greater" than their interests in Chesapeake's prior rate case. Petition at 10 (¶ 16). Petitioners' unremarkable observation that Chesapeake's application in the present case (*i.e.*, request for an accounting order) requests a different type of specific relief than in its prior rate case (*i.e.*, request for a rate increase) does not change the fact that Petitioners continue to seek to protect their competitive interests before this Commission - conduct the Superior Court Order prohibits. Moreover, Petitioners bald assertion that their interest is "far greater" in the present case is irrelevant and, in any event, fails to distinguish the Superior Court Order.

12. Lastly, the Petitioners urge the Commission to ignore the Superior Court Order simply because they claim it "is wrong as a matter of law and fact." Petition at 10 (¶ 16). Unfortunately, the fact that Petitioners disagree with the Superior Court Order is not a reason for

the Commission not to follow it. If DAAEP disagreed with the Superior Court Order it could have appealed the order to the Supreme Court – but it did not.[11] The Petitioners argument to the Commission that the Superior Court Order was incorrectly decided is presented to the wrong tribunal and at the wrong time and should be rejected.

C. The Petition Fails to Satisfy the Requirements of Either Prong of the Commission's Two-Prong Intervention Rule.

13. As explained above, the Petitioners' only true interest in this proceeding is to protect their competitive market share – an interest the Superior Court has already ruled was inappropriate and beyond the jurisdiction of this Commission even to consider. Nevertheless, the Petitioners assert that their intervention satisfies both prongs of the Commission's intervention rule because: (a) their interest will not be adequately represented by the parties to the proceeding; and (b) their intervention would be in the public interest. *See* Petition at 5 (¶ 9). Even if the Superior Court Order did not require the Commission to reject the Petition (which it does), the Petition fails to meet either prong of the Commission's intervention rule.

14. The Petitioners allege that their interests will not be adequately represented in this proceeding for three reasons: (1) Commission Staff and the Department of Public Advocate ("DPA") are not actively engaged in the propane business and lack the day-to-day experience of operating such a business; (2) the Petitioners possess a wealth of knowledge about the comparative benefits of propane versus natural gas, including environmental and economic benefits of both fuels; and (3) the Petitioners are uniquely able to protect the interests of their

[11] Delaware Supreme Court Rule 6 provides that generally the time for taking a civil appeal is within 30 days after the judgment, order or decree is entered in the docket. The time for filing an appeal of the Superior Court Order expired July 7, 2017.

existing propane customers. *See* Petition at 6 (¶ 11). All of the Petitioners arguments are unconvincing.

15. First, whether Commission Staff and DPA lack experience in the day-to-day operations of a propane company is irrelevant to the issues raised in Chesapeake's application in which Chesapeake seeks an accounting order establishing the valuation of the systems, a methodology to set new distribution rates, and the creation of a new rate to recover conversion costs. Chesapeake submits that Commission Staff and DPA are not required to know how to actually operate a propane system in order to evaluate and review the accounting and rate making questions presented by Chesapeake's application. Even if such knowledge was necessary, Chesapeake's affiliate (Sharp Energy, Inc., the current operator of the propane systems) undisputedly possesses that knowledge. Second, the Petitioners' purported knowledge concerning the economic and environmental benefits of propane compared to natural gas (even if true) is not solely in the possession of the Petitioners. In other words, Commission Staff and DPA could review the publicly available literature on the subject or engage any number of expert witnesses to opine on the benefits of propane versus natural gas.[12] Thirdly, the Petitioners' claim to be in a unique position to protect the interests of their existing propane customers fails because the interests of the customers of unregulated propane companies are not within the Commission's authority to protect and therefore cannot form the basis for intervention. It is settled that the Delaware General Assembly created the Commission to balance the interests of public utilities on the one hand and *utility customers* on the other (but *not* unregulated competitors or their customers).[13]

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[12] If the Petitioners actually possess some unique knowledge regarding the environmental and economic benefits of natural gas compared to propane they could offer their services to Commission Staff or DPA as a witness on those topics.

[13] *See,* Superior Court Order at 7 – 8; *see also, Eastern Shore Natural Gas Co. v. Delaware Public Service Commission,* 635 A.2d 1273, 1280 (Del. Super. 1993), *aff'd,* 637 A.2d 10 (Del. 1994), *overruled on other grounds*

16. Finally, the Petitioners assert that "good cause" exists to grant the Petition and doing so would further the "interests of justice" because Chesapeake's application presents "a matter of great importance to the public in Delaware, and to the petitioners, their employees and their customers." Petition at 11 (¶ 18). The Petitioners' simple assertion that Chesapeake's application raises important issues does not demonstrate that their intervention would further the public interest.[14] If that were the case, any party (regardless of their actual interest in the case) could intervene in any Commission proceeding simply by asserting that the proceeding raised "important" issues. Rather than any altruistic concerns regarding the "public interest," Petitioners only true interest in this case is the protection of their members' market share. As explained above (and in the Superior Court Order), the Petitioners' interest in deflecting competition on behalf of their private company members is not a relevant or material issue and is beyond the jurisdiction of the Commission in any event. As explained by the Maine Supreme Court in *Central Maine Power, Co. v. Public Utilities Comm.*, 382 A.2d 302, 314 (Me. 1978), a case relied upon in the Superior Court Order (at 10 – 11), "competitors masquerading as legitimately interested consumers [should have their complaints] addressed to other forums."

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by Public Service Water Co. v. DiPasquale, 735 A.2d 378 (Del. 1999) ("[t]he legislature specifically created the Commission for the purpose of balancing the interests of the *consuming public* with those of regulated companies.") (emphasis supplied).

[14] The second prong of the Commission's intervention rule requires an intervenor to demonstrate that their participation in the proceeding "would be in the public interest." 26-1001-2.0 *Del. Admin. C.* § 2.9.1.3. However, the Petitioners cite to a 1953 Superior Court case (*Kaiser-Frazer Corp. v. Eaton*, 101 A.2d 345, 351 (Del. Super. 1953)) that held that "good cause" existed to lift a default judgment (not a Commission intervention order) and argue that "'good cause' is a very liberal standard and should be applied in a way that favors intervention." *See* Petition at 11 (¶ 18). In addition to the fact that the *Eaton* case is inapposite, the Petitioners' argument suggesting that the Commission apply a liberal standard contradicts Judge Witham's admonition that the Commission cannot apply its intervention rule in a way that exceeds the constraints of its enabling statute. *See* Superior Court Order at 9 ("And although the Commission has the authority to prescribe a rule for intervention in its proceedings, it may not administer that rule in such a way as to extend its jurisdiction to areas not contemplated by the statute."); *see also, In re Dept. of Natural Resources and Environmental Control*, 401 A.2d 93, 96 (Del. Super. Ct. 1978) ("An administrative agency may not adopt regulations which are inconsistent with the provisions of its enabling statute or out of harmony with, or extend the limits of, the Act which created it.").

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Brian M. Quinn, Esquire hereby certify that on the 30th day of October, 2018 a true and correct copy of the foregoing *Opposition to Petition to Intervene* was served upon the parties listed below via email and Delafield.

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